

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MICHAEL A. MANLEY</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 227,779 & 227,920
<b>FARMLAND INDUSTRIES, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>WAUSAU INSURANCE COMPANIES</b>	)	
Insurance Carrier	)	
	)	

**ORDER**

Claimant requested review of the Award dated June 1, 1998, and Award Nunc Pro Tunc dated June 5, 1998, both entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on January 27, 1999.

**APPEARANCES**

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Garry W. Lassman of Pittsburg, Kansas, appeared for the respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Although various dates of accidents have been alleged in Docket No. 227,920, at oral argument before the Appeals Board, claimant stated he was alleging a back injury ending on April 3, 1997. Also at oral argument, respondent and its insurance carrier abandoned the contention that claimant failed to provide timely notice and timely written claim for the accident alleged in Docket No. 227,920.

**ISSUES**

On November 4, 1996, claimant slipped and fell from the top of a water tank. Docket No. 227,779 is a claim for a right shoulder and back injury resulting from that accident and the activities performed at work each day after that date.

Uncertain whether the back injury was caused by the fall, claimant filed a second claim. Docket No. 227,920 is a claim for a back injury that occurred either as the result of the physical therapy administered after the November 1996 fall and resulting shoulder surgery, the repetitive traumas sustained each and every workday ending April 3, 1997, or a combination of the two.

In Docket No. 227,779, the Judge awarded claimant a 4 percent permanent partial disability for the shoulder injury. But the Judge denied claimant compensation in the second proceeding.

Claimant contends the Judge erred by failing to award him compensation for a back injury. Claimant contends Dr. Prostic's testimony is uncontroverted that claimant's work activities, coupled with the physical therapy administered for the shoulder injury, caused the low back injury. Additionally, claimant argues that the Judge erred in adopting Dr. Cochran's functional impairment rating instead of Dr. Prostic's because Dr. Cochran allegedly failed to utilize the Fourth Edition of the AMA Guides for his rating. Claimant requests a combined award for a 17 percent whole body functional impairment.

Conversely, respondent and its insurance carrier contend that claimant sustained only one accident - the incident on November 4, 1996. And as a result of that accident, they contend that claimant sustained a scheduled injury to the right upper extremity only.

At oral argument before the Appeals Board, the parties narrowed the issues to the following:

DOCKET NO. 227,779

- (1) What is the nature and extent of claimant's injuries and disability for the November 4, 1996 accident?

DOCKET NO. 227, 920

- (2) Did claimant injure his back either during the physical therapy administered for the November 1996 accident or when he returned to work after shoulder surgery?
- (3) If so, what is the nature and extent of the injury and disability?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

- (1) Michael Manley worked as a waste water operator in an oil refinery operated by Farmland Industries, Inc.
- (2) On November 4, 1996, Mr. Manley slipped and fell from the top of a water treatment tank. He fell approximately 12 feet to the ground and landed on his heels, buttocks, and back. During the descent, Mr. Manley grabbed the ladder on the side of the tank injuring his right

arm and shoulder. The parties stipulated that the accident arose out of and in the course of employment. Additionally, Farmland and its insurance carrier admit that Mr. Manley injured his right shoulder in this accident but they deny that he injured his low back.

(3) Mr. Manley immediately reported the accident to his supervisor and the company nurse. Because he did not believe anything was broken, he continued to work. But when his right shoulder did not improve after a few days, Mr. Manley returned to the company nurse and requested medical treatment for his shoulder.

(4) The company referred Mr. Manley to Bartlesville, Oklahoma, orthopedic surgeon Scott D. Cochran, M.D., who began treating the right shoulder on December 12, 1996. An arthrogram revealed a partial rotator cuff tear. On March 3, 1997, the doctor performed arthroscopic surgery to decompress the subacromial joint and repair the partial tear. At a follow up visit on March 18, 1997, the doctor released Mr. Manley to return to light work as of March 24 but the doctor restricted him from lifting greater than 10 pounds with his right arm.

(5) According to Mr. Manley, when he returned to work after the shoulder surgery his duties were limited to light activities and he did not do any lifting.

(6) At a follow up visit on April 15, 1997, Mr. Manley complained to Dr. Cochran of low back pain and sciatica in the left leg. According to Mr. Manley's testimony and Dr. Cochran's office notes, this is the first time that Mr. Manley complained of back problems to the doctor.

(7) Both Dr. Cochran and board certified orthopedic surgeon Edward J. Probst, M.D., provided opinions regarding Mr. Manley's permanent functional impairment. Dr. Cochran testified that Mr. Manley has a 4 percent functional impairment to the right upper extremity as a result of the shoulder injury. As he does not treat backs, Dr. Cochran did not attempt to evaluate Mr. Manley's back. But he did state that any back injury, or impairment that Mr. Manley may have as a result of his back, was not caused by the shoulder injury.

(8) Dr. Probst evaluated Mr. Manley at his attorney's request. The doctor testified that Mr. Manley has a 25 percent impairment to the right upper extremity as a result of the shoulder injury plus a 10 percent impairment to the whole body due to the back, with one-half of that 10 percent representing pre-existing impairment.

(9) Mr. Manley contends he injured his back either as a result of the November 1996 fall, the physical therapy that was prescribed after the shoulder surgery, or the work that he performed after he returned to work following the accident.

(10) The Appeals Board agrees with Judge Clark that Mr. Manley has failed to prove that it is more probably true than not that he injured his back as a result of either the physical therapy for his shoulder or the work that he performed for Farmland Industries. The record fails to establish how the back injury occurred. According to Dr. Cochran, the back injury did not occur as the natural result of the shoulder injury as the back and shoulder are not anatomically related. The record does not contain a description of the physical therapy activities. Therefore, the Board can only speculate how the back may have been involved or placed at risk during the physical therapy program. Likewise, knowing that Mr. Manley was

released after his shoulder surgery with a 10 pound lifting limit and, according to his testimony, that he did not lift when he returned to work, the Board can only speculate how the work activities may have injured his back.

(11) Mr. Manley had back problems before the November 1996 accident. Based upon this record, it is just as likely that Mr. Manley's present back problems are related to his pre-existing condition as it is likely that the problems are related to physical therapy or his work. Stripping Mr. Manley's argument to its basic premise, he contends he is entitled to workers compensation benefits for his back because it started hurting while he was either in physical therapy or at work.

(12) After carefully considering the functional impairment ratings provided by Drs. Cochran and Prostic, neither one appears more accurate than the other. Therefore, the Appeals Board averages the ratings and finds that Mr. Manley has a 15 percent functional impairment to the right upper extremity involving the shoulder.

#### **CONCLUSIONS OF LAW**

(1) Every natural and direct consequence that flows from a compensable injury is also compensable under the Workers Compensation Act.<sup>1</sup> But Mr. Manley has failed to prove that the alleged back injury developed as a natural and direct result of the November 1996 fall, as a result of the physical therapy administered for the right shoulder, or as a result of the work activities that he performed after the fall.

(2) Mr. Manley's workers compensation benefits are limited to those for the right upper extremity only. Therefore, his permanent partial disability benefits are to be determined under the provisions of the "scheduled" injury statute.<sup>2</sup>

(3) The scheduled injury statute provides that a worker is entitled to a maximum of 225 weeks of permanent partial disability benefits for the loss of an arm and shoulder. As provided by regulation,<sup>3</sup> after subtracting two weeks of temporary total disability benefits from 225 weeks the resulting number is multiplied by the 15 percent functional impairment rating to yield 33.45 weeks of permanent partial disability compensation that Mr. Manley is entitled to receive as a result of the shoulder injury.

(4) The Appeals Board adopts the findings and conclusions set forth in the Awards to the extent they are not inconsistent with the above.

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<sup>1</sup> Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

<sup>2</sup> K.S.A. 1996 Supp. 44-510d.

<sup>3</sup> K.A.R. 51-7-8.

**AWARD**

**WHEREFORE**, the Appeals Board modifies the Award dated June 1, 1998, and the Award Nunc Pro Tunc dated June 5, 1998, entered by Judge Clark to increase the functional impairment to right upper extremity, including the shoulder, from 4% to 15%.

In Docket No. 227,779, Michael A. Manley is granted compensation from Farmland Industries, Inc. and its insurance carrier for a November 4, 1996 accident and the resulting 15% functional impairment to the right upper extremity and shoulder. Based upon a \$680 average weekly wage, Mr. Manley is entitled to two weeks of temporary total disability benefits at \$338 per week, or \$676, followed by 33.45 weeks of permanent partial disability at \$338, or \$11,306.10, making a total award of \$11,982.10, which is all due and owing less any amounts previously paid.

The Appeals Board affirms the Award denying benefits entered by Judge Clark in Docket No. 227,920.

The Appeals Board adopts the remaining orders as set forth in the Awards to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Pittsburg, KS  
Garry W. Lassman, Pittsburg, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director